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(18,833)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 217.

WILLIAM SHEPARD, CHARLES McLEISH, THOMAS McLEISH AND JOSEPH BUSCH,

APPELLANTS,

VERSUS

O. E. D. BARRON, TREASURER OF FRANKLIN COUNTY, OHIO,

APPELLEE.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR APPELLEE.

Henry A. Williams,

Augustus F. Seymour,

~~Dyer, Williams & Seymour,~~

~~Taylor, Seymour & Wenner,~~

Attorneys for Appellee.

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

Appellants complain of the decree of the Circuit Court solely upon constitutional grounds, and seek to be relieved from the payment of an assessment for a local improvement levied upon their property, on the theory that the statute under which such

assessment was made is repugnant to the provisions of Section 1 of the fourteenth amendment to the constitution of the United States, in the following respects:

(1) Because there was no provision in the statute for notice to the property owners at the time when the assessment would be made, and consequently no opportunity was given to them to make objection to the amount estimated as special benefits and that thereby appellants were denied due process of law.

(2) That said statute in its terms necessarily provided for and permitted the taking of the property of appellants for public use without just compensation, and that the amount assessed against such property was in effect confiscation under the guise of taxation.

(3) It is urged as error in the decree of the court below that the court found and determined that appellants were by their conduct estopped from maintaining their suit and were, therefore, not entitled to the relief prayed for in their bill.

The assessment, the collection of which was sought by the action in the court below to be restrained, was levied under and by virtue of the provisions of an act of the General Assembly of the state of Ohio, passed March 26, 1890. (87 Ohio L., 113). On March 31, 1890, a petition was filed with the board of county commissioners of Franklin county, Ohio, signed by appellants, and therein praying for the construction of a permanent roadway on East Broad street extended in said county. In May ,1890, said county commissioners granted the prayer of said petition, and ordered said East Broad street upon which the property of appellants abutted to be paved with asphalt to the extent of about forty-eight hundred feet beyond the city limits.

In the month of August, 1890, said commissioners contracted for said paving and by October 1, 1891, said improvement was completed. In December following the cost of the improve-

ment was assessed upon the abutting property in accordance with the provisions of the aforesaid act. The whole number of feet frontage upon both sides of said East Broad street and abutting the improvement was nine thousand, six hundred and fifteen feet of which the property of appellants embraced eleven hundred and eleven feet, being practically one-ninth of the whole frontage abutting on said improvement, and the property of the appellants was assessed a total of $12,-586.07. On or about August 4, 1890, the county commissioners issued bonds in the sum of $50,000, the proceeds of which were ordered to be applied and were applied towards paying for said improvement, as provided for by said act of March 26, 1890; and on or about August 1, 1891, said county commissioners ordered additional bonds of the amount of $60,000 to be issued, the proceeds of which were to be applied and were applied to the payment of the cost of said improvement. (Transcript of Record, pp. 95, 101, 102). The appellants were a co-partnership at the time the petition for said improvement was filed, and during the entire time the improvement was being constructed. And in all of the proceedings, had for the purpose of making said improvement, were acting together and under the firm name of The Alum Creek Ice Company, and during the progress of said improvement said Alum Creek Ice Company was represented by either Dr. William Shephard or Charles McLeish, each of whom had full authority to represent said firm. The property which abutted on said improvement was owned by said appellants and used by them in conducting the business of The Alum Creek Ice Company. (Transcript of Record, pp. 36, 37, 45, 71, 77).

For the purpose of inducing the board of county commissioners of Franklin county, Ohio, to make the improvement of East Broad street in the manner and to the extent the same was afterward constructed, appellants actively promoted and assist-

ed in making all of such improvement and acquiesced in and authorized the making of all of the expenditures represented by the assessment complained of in their bill and authorized and consented to the assessment of the cost thereof against their said property by the foot front, to the extent and in the manner set forth in appellants' bill. The more material of these acts of appellants in the promotion of said improvement are as follows:

(1) The said appellants, together with others, signed the original petition, which was filed with said board of county commissioners on the thirty-first day of March, 1890, and within five days after the passage of the act which they are now assailing as unconstitutional, wherein the making of said improvement was asked for; and said board of county commissioners had no authority to order and would not have ordered said improvement to be made except for the acts and requests of appellants and others that said improvements be made, under said law. (Transcript of Record, pp. 62, 76, 77, 94, 95).

(2) On or about the ——— day of ————, 1892, the appellants under the name and style of The Alum Creek Ice Company with others, filed with the county commissioners of Franklin county, a request in writing (Exhibit D, Transcript of Record, p. 73), that a fifteen-inch sewer pipe be laid on the south side of said street, and that a twenty-four inch sewer pipe be laid on the north side of said street, and that a suitable gutter be laid on the side next to the curb of the two outer driveways on said Broad street, and "that the expense of said work be assessed against our respective property on said street, the same as other expenses for making said improvement are levied and paid." The construction of said sewers was necessary for the proper completion of said improvement, and said sewers were a direct benefit to the abutting property of appellants and others.

(3) On or about the ——— day of ———, 1890, and before said improvement was completed the said appellants filed with said Board of County Commissioners, a petition in writing (Exhibit B, Transcript of Record, p. 74), signed by their own individual names with others, in which petition they requested said board of county commissioners to cause all bonds issued for the payment of the expense of said improvement to be for a period of twenty years from the date thereof, and wherein they stated further that if said county commissioners could extend the time to twenty years for the bonds already sold, such extension of time would be satisfactory to said appellants.

(4) On or about the twenty-ninth day of June, 1891, said appellants under the name of The Alum Creek Ice Company, together with other land owners abutting upon said improvement, filed with said board of county commissioners a written communication (Record, pp. 92 and 93), whereby they *expressly withdrew all objection to said improvement and the assessment on their said real estate therefor,* on condition that the Columbus Land Association, one of the abutting property owners, would secure and pay the entire expense of removing all the earth upon the circle in East Broad street and beautifying and adorning said circle. Said circle was established by the board of commissioners on the eighteenth day of August, 1890 (Transcript of Record, p. 93), and became a part of said improvement, and was declared to be a public circle, and was two hundred and fifty feet in diameter, the land for which was donated by the Columbus Land Association, and said circle was dedicated to the public use.

(5) On or about the second day of September, 1891, the appellants, William Shepard and Charles McLeish, and also The Alum Creek Ice Company, filed with the county commissioners of Franklin county, Ohio, a petition in writing (Tran-

script of Record, pp. 72 and 73), in which petition they asked for a cancellation of that part of the contract with one N. B. Abbott, which provided for sodding the sides of the roadway, and in said communication the said parties, together with other abutting property owners each promised to see that grass seed was sown upon the sideways of said East Broad street, and agreed to take upon themselves the care and charge of the same.

(6) In Section 13 of the Act of March 26, 1890, the board of county commissioners were authorized to designate two or more owners of property abutting on said improvement who, together with the county surveyor, should constitute a board, which board should elect a superintendent, and in pursuance of this provision, one of the appellants, William Shepard, was appointed by the Board of County Commissioners a member of said board on the nineteenth day of May, 1890, and said Shepard afterward accepted said appointment, and acted as one of the road commissioners until the improvement was finally completed. (Transcript of Record, pp. 70 and 92).

(7) Appellants have paid seven annual installments of the assessments levied for the construction of said improvement as charged against their land, from the year 1892 to 1899, inclusive, without protest or objection, each annual payment being $1258.61. (Transcript of Record, pp. 4, 84).

(8) Appellants have remained silent and have failed to object to or complain of said assessments from 1891, when the same was placed upon the tax duplicate against the property, until the month of June, 1899, when the bill herein was filed, and during all the years between said dates; nor did they make any objection or protest while the improvement was in the process of construction. (Transcript of Record, p. 1).

(9) On the —— day of ——, 1890, the appellants, William Shepard and Charles McLeish, representing 1111 feet fronting upon said improvement signed and filed with the Board of

County Commissioners a waiver for the purpose of causing said commissioners to make and complete this improvement, and for the further purpose of removing any suspicion concerning bonds already sold and to be sold, and to assure said commissioners that no objection would be made by them or any of them concerning the legality of any and all action taken by said commissioners in connection with the construction of said improvement.

This waiver is of such great importance to a proper understanding of the relation existing at the time between the appellants and the Board of County Commissioners representing Franklin county, Ohio, and indicates so strongly the interest and activity manifested by appellants in the promotion of said improvement that we copy the same in full at this point in our brief, although the same appears in the record at pp. 94 and 95.

"To the Honorable Board of County Commissioners of Franklin County, Ohio:

Whereas, on the thirty-first day of March, 1890, a petition signed by the subscribers hereto, was by us presented to the Board of County Commissioners of Franklin county, Ohio, praying for the extension of East Broad street in this county, beginning at the bridge across Alum Creek on said street, and advancing eastwardly therefrom to Cassady road, which said portion of said street lies in Marion township, said county, which said improvement was in said petition prayed to be made under the provisions of an act of the General Assembly of Ohio, entitled, 'An Act to authorize county commissioners in counties in which there are situated cities of the first grade of the second class to improve roads extending from such cities and other roads or streets in certain cases,' passed March 26, 1890, which said petition stated with what material said street should be paved, and what provisions should be made for sidewalks, gutters and other passages for carrying off water, and between what points said street was to be improved, and the kind of material of a permanent character said commissioners desired to be used in said improvement, and

Whereas, said petition was signed by all persons owning property abutting upon the portion of said street in said petition

asked to be improved, said petition stating the number of feet between the termini of said improvement, and

Whereas, such proceedings were had by said Board of County Commissioners in said petition, and in accordance with said act of the General Assembly, that the prayer of said petitioners was granted and said improvement was ordered to be made in accordance with the prayer of said petition, and

Whereas, said original petition as well as other papers filed since said original papers, and certain orders made by said Board of County Commissioners relating to said improvement, have been lost or mislaid, and

Whereas, since the making of said original order by said Board of County Commissioners directing said improvement to be made some important changes in the plan, extent and character of said improvement have been ordered by said Board of County Commissioners, and have been made or are now being made at the written request of each and all of—including the construction of a circular park in said street and sewers for proper drainage and other things not herein particularly mentioned, and

Whereas, by reason of said changes and extensions the cost of said improvement has been increased in a large amount beyond that contemplated, and which would have been sufficient according to said original petition and plan, and

Whereas, some doubts have arisen as to the legality of the proceedings of said Board of County Commissioners in said matters and of bonds that have been or may hereafter be issued by said Board of County Commissioners for the purpose of raising the means to pay the cost and expense of said improvement.

Now, therefore, in consideration of said improvement as the same has been and now is being constructed, and in order that the bonds heretofore issued and to be issued to pay for said improvement may not lie under suspicion or remain unsold by reason of the absence, or loss of said original or other papers and orders, or by reason of the other matters, acts and things hereinbefore stated, we, and each of us, hereby agree that such petition hereinbefore recited was filed, signed by us as herein stated, and that we will not set up as a defense against the collection of any assessment upon our said property abutting upon said improvement for the payment of bonds issued, or to be issued on account thereof, any informality or irregularity aris-

ing from the absence or loss of any of said papers, or any of the other matters and things hereinbefore recited, but agree that said improvement has been and now is being legally made and constructed, and we hereby request that you execute and issue such further amounts of bonds as shall be necessary to pay the costs of said improvement.

Signed, Logan M. Bullit, per the Columbus Land Association, by T. E. Powell, director; feet front, 3775.34 feet.

Mary P. Markeson, by C. E. Markeson, agent in fact; feet front, 375.54.

F. C. Sessions, feet front, 747.41.

William Shepard and Charles McLeish, feet front, 1111.

J. C. Lunn, 361.87.

The heirs of Henry Stansberry, deceased, by John R. Stansberry, agent in fact, 550 feet."

The record further discloses that said Board of County Commissioners immediately after this waiver was filed, and relying upon it, passed a resolution to deliver to the Ohio Savings Bank $60,000 of bonds theretofore advertised for sale. (Transcript of Record, p. 95).

(11) On the first day of July, 1899, a warranty deed was executed by Leonard Carr, one of the original complainants in this case as grantor to James McLeish and Joseph Busch, now appellants, conveying one-third interest in the premises described in the bill herein, in which deed as is stipulated herein, the following exception appears, "Except a mortgage for $6000 given by William Shepard, Charles McLeish and wife and Leonard Carr and wife to F. F. Huffman, as recorded in mortgage record, 156, p. 560, Franklin county, Ohio, Records, and excepting all taxes and assessments of whatever kind and nature that may be a lien on the one-third part of the Marion township property hereby conveyed, and all taxes, liens and assessments that may be due and unpaid on the other property hereby conveyed, being hereby assumed by the grantee herein as part of the purchase price for said premises."

ARGUMENT.

Applying the rule to this case, that the acts and operations of all public officials are deemed to be rightly conducted according to law, and the further rule that the presence upon the tax duplicate of any county of a charge against a person or property of a tax or an assessment carries with it the *prima facie* presumption that the tax or assessment is valid, and the amount thereof due and unpaid, the burden of proof is in the first instance thrown upon the appellants who are challenging the assessment, to establish its invalidity. (Sec. 1104, Revised Statutes of Ohio).

This burden of proof appellants attempted to meet on the trial in the Circuit Court as a legal proposition by stating and claiming the unconstitutionality of the statute under which the assessment was made by virtue of the provisions of Section 1 of the 14th amendment. If they can succeed in establishing such unconstitutionality, we concede that they have made out a case which overcomes the presumption of validity set forth in the statute.

While not seriously contraverting the facts disclosed by the testimony and the exhibits in the record and hereinbefore severally stated, counsel for the appellants contend (1) that the assessment levied under this act was and is in excess of the special benefits conferred on the property of appellants, and (2) that the act contravenes the Federal constitution, because there is no provision in the law for the ascertainment of the amount of special benefits conferred upon the abutting property by the improvement. In other words, it is claimed that by the provisions of the act the ascertainment of special benefits is

necessarily excluded from consideration in the plan and method adopted for the selection of the property benefited. This conclusion of counsel is based upon the assumption that the assessment of the cost of a local improvement upon abutting property by the foot front is necessarily obnoxious to the Fourteenth Amendment of the Constitution of the United States.

The foot front method is not contrary to the Federal Constitution.

The mode of assessing the cost of local improvements upon the abutting property by the foot front has been in operation for many years in most if not all of the states, and has been repeatedly sustained by the courts of last resort whenever such scheme of apportionment has been brought to their attention. As has been stated by Mr. Justice Harlan in the case of Norwood v. Baker, 172 U. S., 269, "Exact equality in taxation is seldom if ever attainable," but it has been the experience of administrative and taxing officers that the assessment by the foot front plan comes as near an equal uniformity in distribution of the burden of the cost of the special assessment as any method that has been adopted. The constitutionality of such method was never questioned so far as we have been able to learn from the examination of the authorities until the case of Norwood v. Baker, *supra*, decided December 12, 1898. Since the announcement of the opinion in that case by Mr. Justice Harlan, both the Federal and state courts, out of proper respect for the distinguished tribunal whose decision he announced, and in an attempt to follow what they understood to be the legal effect of that decision, have been led to modify the rulings formerly made respecting assessment by the foot front, and the apparent departure, as some of them conceived, of the highest judicial body in this country from the established doctrine led many to rush into court, as the complainants have done in this

case in an attempt to cast from their property a charge for a local improvement whose justice and validity they had not theretofore thought of challenging or questioning.

Shortly after the decision of the Baker case by the Supreme Court of the United States, Judge Phillips, of the Circuit Court of the Southern District of Missouri, had occasion to consider the question of assessment by the foot front in a case brought before him from the city of Springfield. (Fay v. The City of Springfield, 94 Fed. Rep., 409). In that case Judge Phillips followed the rule of the Supreme Court as he understood it be announced in the case of Norwood v. Baker, and plants his ruling as he expressly declares in his opinion on page 410, of the report, squarely upon the authority of the Norwood v. Baker case. These two Federal cases, and the case of Chamberlain v. Cleveland, 34 Ohio State, 551, to which we shall have occasion to refer more at length later on, are the only cases cited by counsel to support the proposition that the levy of an assessment for the payment of the cost of a local improvement by the foot front method in itself necessarily implies that special benefits were not considered, and therefore that such an assessment is obnoxious to the constitutional inhibition. The two Federal cases cited are so much at variance with the uniform holding of this court, both before and after the announcement of the decision in the Norwood case that we deem it proper to refer to the decisions relative to the foot front doctrine as it has been treated in the adjudications.

In the case of Cass Farm Company v. Detroit, 181 U. S., 396, decided April 29, 1901, an assessment for the cost of paving, by the foot frontage was sustained. On the same day the decision in the cases of French v. Asphalt Paving Company, Tonawanda v. Lyon, Wight v. Davidson, Webster v. Fargo, Detroit v. Parker, Schumate v. Heman and other assessment cases were announced, in which the doctrine of the

case of Norwood v. Baker although not overruled in terms, was so restricted and limited in its operation as to deprive it of any controlling force as any authority in a street assessment case.

Indeed, as was aptly stated by Mr. Justice Harlan in the dissenting opinion in the French case, "I submit that this case can not be distinguished from Norwood v. Baker upon the ground that the village of Norwood proceeded without legislative sanction." Mr. Justice Shiras also defined the limits of the Baker case in the following language on page 345, of the opinion:

> "It may be conceded that courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty or property, without due process of law. And such, in the opinion of a majority of the judges of this court, was the nature and effect of the proceedings in the case of Norwood v. Baker."

But there is no such a state of facts in the present case.

In the case of Tonawanda v. Lyon, 181 U. S., 389, this court held:

> "It was not the intention of the court, in that case, to hold that the general and special taxing systems of the states, however long existing and sustained as valid by their courts, have been subverted by the Fourteenth Amendment of the Constitution of the United States. The purpose of that amendment is to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by congress."

That case was an action to restrain the corporate authorities of the town of Tonawanda, New York, from enforcing payment of certain assessments against tracts or parcels of land belonging to the complainant, situated in the town of Tonawanda, and abutting on Delaware street in said town. The principal ground of the objection against the assessment was

that the method of meeting the expense of grading and paving said street was by assessing the same against the lots abutting on the street, according to the frontage thereon, and that the statutes and proceedings thereunder which provided for that method were contrary to the provisions of the Constitution of the United States, in that thereby the land of the complainant would be taken for public use without just compensation, and he would be deprived of his property without due process of law. On page 391, Mr. Justice Shiras, after stating the case, delivered the opinion of the court in the following language:

> "The complainant in the court below did not put his claim for equitable relief upon any allegation that, in the proceedings to pave Delaware street and to assess the cost of the improvement upon the abutting property, there had been any departure from the provisions of the statute, or that there had been attempted any discrimination against him or his property. Nor was it denied that it is the settled law of the state of New York that the method prescribed, of meeting the expense by apportioning the entire cost of such an improvement upon the abutting land according to the foot-front rule, is a valid exercise of legislative power. *The People v. Mayor, &c.*, 4 N. Y., 419; *Spencer v. Merchant*, 100 N. Y., 585.
>
> "What was claimed was that a state statute, which directs municipalities to assess the whole expense of paving any highway therein upon the lands abutting upon the highway so improved in proportion to the feet frontage of such lands, without providing for a judicial inquiry into the value of such lands and the benefits actually to accrue to them by the proposed improvement, is unconstitutional and void. And it was held by the court below that, notwithstanding the courts of the state may have held otherwise, it was its duty to follow the decision of this court in the case of *Norwood v. Baker*, 172 U. S., 269, which was regarded by the court below as establishing the principle contended for, and accordingly the defendants were enjoined from enforcing payment of the assessment. But we think that, in so understanding and applying the decision in *Norwood v. Baker*, the learned judge extended the doctrine of that case beyond its necessary meaning.

"It was not the intention of the court, in that case, to hold that the general and special taxing systems of the states, however long existing and sustained as valid by their courts, have been subverted by the Fourteenth Amendment of the Constitution of the United States. The purpose of that amendment is to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by congress. The case of *Norwood v. Baker*, presented, as the judge in the court in the present case well said, 'Considerations of peculiar and extraordinary hardships,' amounting, in the opinion of a majority of the judges of this court, to actual confiscation of private property to public use, and bringing the case fairly within the reach of the Fourteenth Amendment.

"The facts disclosed by the present record do not show any abuse of the law, nor that the burdens imposed on the property of the complainant were other than those imposed upon that of other persons in like circumstances; and it is obvious from expressions in the opinion of the trial judge, that he reached his conclusion because constrained by what he understood to be the principle established by the *Norwood* case."

In the opinion of Mr. Justice Shiras, in the case of Cass Farm Company v. Detroit, *supra*, p. 397, it is said:

'We learn from a statement in the opinion of the Supreme Court that among other grounds of relief stated in the bill was the following: 'That the provisions of the charter and of the paving ordinances of the city, in so far as the same provide for an assessment of the cost of paving upon the abutting property in proportion to the frontage of such property, were in violation of the Constitution of the United States, and the amendments thereof, and therefore null and void.'

"The State Supreme Court disposed of this contention in the following language:

" 'In paving cases the rule has been settled in this state by many decisions that it is competent for the legislature to authorize the cost of paving streets to be assessed upon the abutting property according to frontage.

"'It was said by Mr. Justice Cooley, in *Sheley v. Detroit*, 45 Michigan, 431:

"'We might fill pages with the names of cases decided in other states which have sustained assessments for improving streets, though the apportionment of the cost was made on the same basis as the one before us. If anything can be regarded as settled in municipal law in this country the power of the legislature to permit such assessments and to direct an apportionment of the cost by frontage should by this time be considered as no longer open to question. Writers on constitutional law, on municipal law and on the law of taxation have collected the cases and have recognized the principle as settled; and if the question were new in this state we might think it important to refer to what they say, but the question is not new. It was settled for us thirty years ago.

"'We should feel inclined to follow the opinion of the Supreme Court of the United States in *Norwood v. Baker*, inasmuch as it was based on the Fourteenth Amendment of the Constitution of the United States, if that were a paving case; but that was a street opening case, and until that court shall pass upon the question in the exact form in which it is here presented, we shall feel bound to follow our own decisions.' *The Cass Farm Improvement Co. v. Detroit*, 83 N. E. Rep., 108."

Continuing, Justice Shiras says:

"We have recently held that it was not the intention of the Fourteenth Amendment to subvert the systems of the states pertaining to general and special taxation; that that amendment legitimately operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty and property as is afforded by the Fifth Amendment against similar legislation by congress, and that the Federal Courts ought not to interfere when what is complained of is the enforcement of the settled laws of the state applicable to all persons in like circumstances and conditions, but only when there is some abuse of law, amounting to confiscation of property or deprivation of personal rights, as was instanced in the case of *Norwood v. Baker*, *French v. Asphalt Paving Co.*, *Tonawanda v. Lyon*, *Wight v. Davidson*, *ante*, 324, 389, 371."

In the case of *Detroit v. Parker*, 181 U. S., 399, the court again announced the rule in accordance with the Cass Farm Company case and departed from the doctrine of *Norwood v. Baker*. The foundation for the bill in equity in the Parker case which was brought before the Supreme Court for review was the allegation that the statutes of the state of Michigan and the ordinances of the city of Detroit, which provide for the paving and grading of the streets, the assessment of which was sought to be enjoined, were in violation of the rights of the complainant under the Fourteenth Amendment to the Constitution of the United States, in that they do not provide for any hearing or review of assessments at which the property owner can show that his property was not benefited to the amount of such assessment, but that the same shall be made arbitrarily according to the foot front. The case was disposed of by the learned judge in the United States Circuit Court for the Eastern District of Michigan as follows:

> "It is the claim of complainant that the charter, in the provisions mentioned, that the entire cost of the street improvements, except for street and alley crossings, etc., shall be assessed against the abutting property by the fronting measurement, without any regard to the special benefits received by the property or their relation to the cost of the improvement, is in conflict with the Fourteenth Amendment of the Constitution of the United States, and is null and void; that such legislation constitutes taking of property without just compensation, and is a denial of equal protection of the law. The case of the *Village of Norwood v. Baker*, 172 U. S., 269, is the foundation for this position, and seems fully to sanction it. * * * The Supreme Court of Michigan has declined to depart from its decisions sustaining the constitutionality of like statutes providing for assessments per foot front, on the ground that the ruling in Baker v. Norwood must be confined to the facts of that case and has no application to an assessment for paving. With all respect for that learned tribunal, I am constrained, under the cases cited, to a different opinion of the decision, and to follow the Supreme Court

of the United States upon the construction of the Fourteenth Amendment of the Federal Constitution."

Accordingly a decree was entered in accordance with the prayer of the bill, by the Circuit Court, and a perpetual injunction was issued. (See *Parker v. Detroit,* 103 Fed. Rep., 357).

In delivering the opinion, this court, on page 401, referred to the Cass Farm Company case, and quoted with approval the language we have already cited in this brief, and as a result thereof, reversed the decree of the Circuit Court and remanded the case to that court with direction to dismiss the bill of complaint.

The other Federal cases cited by counsel of *Fay v. The City of Springfield,* 94 Fed. Rep., does not seem to have been reviewed by the Supreme Court of the United States, but a like case from the state of Missouri was carried from the Supreme Court of Missouri to the Supreme Court of the United States, and in that case practically the same question is decided as is presented in the case of *Fay v. Springfield.* The later case reported is *Heman v. Allen,* in 156 Missouri Reports, page 534, but in the Supreme Court of the United States, it was known as *Shumate v. Heman,* and is reported in the 181 U. S., 402, and practically reverses the case of *Fay v. Springfield,* relied upon by counsel for plaintiff in error.

The constitutionality of a statute which authorizes or requires an assessment to be levied according to the frontage of the property abutting thereon is carefully considered in the case of *French v. Barber Asphalt Paving Co.,* 181 U. S., 325 (another Missouri case), and it is there held that according to the weight of authority that question is one of legislative expediency. As before stated, the cases which were decided by the Supreme Court of the United States at the same time as *French v. Barber Asphalt Paving Co.* seem to dispose of any contention that an assessment levied by the foot front mode is illegal, and

hold that such mode of assessment is not repugnant to any provision of the Federal Constitution.

For further authority, see:

Paulsen v. Portland, 149 U. S., 30.
Fallbrook Irrigation Dist. v. Bradley, 164 U. S., 112.
Bauman v. Ross, 167 U. S., 548.
Parsons v. Dist. Columbia, 170 U. S., 45.
Webster v. Fargo, 181 U. S., 623.

In the third edition of Cooley on Taxation, just issued, the rule is thus declared at page 1217 of the second volume:

> "In many instances where streets were to be opened or improved, sewers constructed, water pipes laid or other improvements entered upon, the benefits of which might be expected to diffuse themselves along the line of the improvement in a degree bearing the same proportion to the frontage, the legislature has deemed it right and proper to take the line of frontage as the most practicable and reasonable measure of probable benefits; and making that the standpoint to apportion the benefits accordingly. Such a measure of apportionment seems at first blush to be perfectly arbitrary and likely to operate in some cases with great injustice; but it can not be denied that in the case of some improvements, frontage is a very reasonable measure of benefits; much more just than value would be; a practice approaching equity as nearly as any estimate of benefits made by the judgment of men. However that may be the authorities are well united in the conclusion that frontage may lawfully be made the basis of apportionment."
>
> Citing numerous Federal and State cases.

Foot front plan of assessment has been uniformly sustained in Ohio.

The decisions of the Supreme Court of Ohio on the question of assessing the cost of local improvements upon the abutting property owners by the foot frontage are in entire accord with the Federal holdings, and those of the courts of last resort of

most of the states. The rule has been declared in the following cases, among others:

Ernst v. Kunkel, et al., 5 Ohio St., 521.
Northern Indiana R. R. Co. v. Connelly, 10 O. S., 160.
Hill v. Higdon, 5 O. S., 246.
Upington v. Oviat, 24 O. S., 232.
Wilder v. Cincinnati, 26 O. S., 284.
Cincinnati v. Oliver, 31 O. S., 371.
Jaeger v. Burr, 36 O. S., 164.
Haviland v. Columbus, 50 O. S., 471.
Parsons v. Columbus, 50 O. S., 460.
Sandrock v. Columbus, 51 O. S., 317.
Findlay v. Frey, 51 O. S., 390.
Schroeder v. Overman, 61 O. S., 1.
Walsh v. Sims, 65 O. S., 211.
Shoemaker v. Cincinnati, 68 O. S., 603.

The statute is not subject to the objection that due process of law is denied by its provisions for want of notice to property owners, before the levy of the assessment therein provided for.

The term "due process of law," as used in the Fourteenth Amendment of the Constitution of the United States and in many of the State Constitutions, is not an inflexible term, meaning essentially the same thing at all times, but is necessarily adaptable so as to meet different conditions as they may be presented.

As is well stated by Mr. Justice Field in the case of *Hager v. Reclamation District* No. 108, 111 U. S., 701, 707, "What constitutes that process it may be difficult to define with precision so as to cover all cases. It is no doubt wiser, as stated by Mr. Justice Miller in *Davidson v. New Orleans*, to arrive at its meaning 'by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decision may be founded.' 96 U. S., 97, 104. It is sufficient to observe here that by 'due process' is meant one which, following the forms of law, is

appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivation of either without the observance of those general rules established in our system of jurisprudence for the security of private rights.

Hurtado v. California, 110 U. S., 516, 536.

"The appellant contends that this fundamental principle was violated in the assessment of his property, inasmuch as it was made without notice to him, or without his being afforded an opportunity to be heard respecting it, the law authorizing it containing no provision for such notice or hearing. His contention is that notice and opportunity to be heard are essential to render any proceeding due process of law which may lead to the deprivation of life, liberty or property. Undoubtedly, where life and liberty are involved, due process requires that there shall be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax, and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes and assessments. As stated by Mr. Justice Bradley, in his concurring opinion in *Davidson v. New Orleans*: 'In judging what is "due process of law" respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law," but if found to be arbitrary, oppressive and unjust, it may be declared to be not "due process of law.'"

In the case of *Detroit v. Parker*, 181 U. S., 399, the Supreme Court decided that an assessment to pay for the paving and grading of a street which was improved under a statute which did not provide for a hearing or review of the assessment at which the property owners could show that the property was not benefited to the amount of such assessment, and that such assessment was levied arbitrarily according to foot front, was not illegal. The syllabus in that case was as follows:

> "An assessment for the cost of a street improvement as made arbitrarily according to the foot front is not in violation of the Constitution of the United States for failure to provide any hearing or review thereof at which the property owner can show that his property was not benefited to the amount of the assessment."

In the opinion of Mr. Justice Shiras, a statement is made of the facts, which applies verbatim to the case under consideration:

> "There was no allegation or proof that in the proceedings which resulted in the making of the improvements and in assessing complainant's lots for a portion thereof, there had been any disregard of the provisions of the statutes and ordinances, or that complainant's property had been charged differently from that of other lot owners."

In the case of *French v. Barber Asphalt Paving Co.*, 181 U. S., 324, already quoted, the court held: "The apportionment of the entire cost of a street pavement upon the abutting lots according to their frontage without any preliminary hearing as to benefits may be authorized by the legislature, and this will not constitute the taking of property without due process of law."

In the case of *Parsons v. District of Columbia*, 170 U. S., 45, Mr. Justice Shiras, on page 54, plainly points out the distinction between a tax or assessment imposed by direct exercise of the legislative power, calling for no inquiry into the weight of the evidence, nor for anything in the nature of a judicial exam-

ination, and a tax or assessment imposed upon property according to its value to be ascertained by assessors on evidence. He declares that "In the former case no notice to the owner is required, but that in the latter case the officers, in estimating the value, act judicially, and a notice and an opportunity to be heard are necessary. In giving the opinion of the Court (*Hager v. Reclamation District*) it was said by Mr. Justice Field (page 709), 'Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes, * * * and generally specific taxes on things, or persons or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the tax payer. No right of his is, therefore, invaded.' "

It is apparent from the foregoing that due process of law does not necessarily mean a judicial investigation or inquiry of the formality pursued by the courts. It further follows that due process of law does not necessarily mean in taxing or assessment cases that notice shall be given to the parties to be affected. It means only, as we take it, in the light of these authorities, that the party complaining shall be treated throughout all the steps relating to the assessment in the mode and manner prescribed by law and given the same rights, the same opportunities for hearing, and the same treatment as is accorded to all other persons in like condition. If a notice to him will subserve no useful purpose, and if upon notice he were to appear, the procedure would not be affected or changed, nor his

condition benefited or improved, the absence of notice does not deprive him of any right, or violate the requirement of due process of law.

In the recent case of *Turpin v. Lemon*, 187 U. S., 51, this court again had occasion to consider the meaning of the term "due process of law," and commented upon it in the following language:

> "Exactly what due process of law requires in the assessment and collection of general taxes has never yet been decided by this court; while it has been held that notice must be given to the owner at some stage of proceedings for condemnation or imposition of special taxes, it has also been held that laws for assessment and collection of general taxes stand upon a somewhat different footing, and are construed with the utmost liberality, sometimes even to the extent of holding that no notice whatever is necessary. (Mr. Justice Field's definition of "Due process of law," in *Hager v. Reclamation District*, 111 U. S., 701, followed), and the Fourteenth Amendment is satisfied by showing that the usual course prescribed by the state laws requires notice to the taxpayers and is in conformity with natural justice."

The act in question, however, does provide for notice in Section 3, as follows:

> "Whenever the commissioners of such county shall receive such petition they shall appoint a time and place for the hearing of said application, not less than four weeks thereafter, publish a notice of such hearing in some newspaper of general circulation in the vicinity of the proposed improvement for not less than two consecutive weeks, once each week, and cause copies of such notice to be given to all owners of property fronting upon the proposed improvement, their agents or attorneys, at least two weeks before said hearing."

This notice was important and necessary in order that property owners who might be affected thereby should be informed that the authority of the commissioners had been invoked by proper petition, and that the question of their future action

respecting the improvement would be taken or considered at a certain designated time and place. The receiving of such notice was in itself notice to said property owner of all the steps and processes which might follow under and by virtue of the act under which it was given, and no second notice was necessary. It is not claimed that such notice was not given to the grantor of plaintiff in error.

Assuming the law to be valid in all respects other than the giving of notice, the property owner was bound to have knowledge of all it provided and of all that might be done by virtue of its provisions.

Appellants are estopped to contest the assessment.

If, however, the court should determine that the act under which the improvement in question was made contravenes the provisions of the Fourteenth Amendment to the Federal Constitution, as pleaded in appellants' petition, even then appellants are not entitled to the relief for which they ask. They are seeking the intervention of a court of equity, and under the facts clearly established by the evidence, they have put themselves in such a position that they cannot be heard to complain of the improvement, the benefits of which they now attempt to challenge.

It is our contention both under the State and Federal authorities, that the constitutional rights bestowed by the amendments to the Federal Constitution against unjust taxation, and the taking of property without due process of law, given for the protection of private property, may be effectually waived by those affected thereby who consent either expressly or by implication to such action respecting their property, as might otherwise be invalid because of constitutional inhibitions. This doctrine is supported by the decision of the Supreme Court of

Ohio in the case of *State v. Mitchell,* 31 O. S., 592. In that case the rule was enunciated that,

> "Notwithstanding the unconstitutionality of the act, where the abutting lot owners have caused a street to be improved under the act, and bonds of the city to be negotiated to pay for the improvement, all who have participated in causing the improvement to be made, are estopped from denying the validity of an assessment made in accordance with the act to pay such bonds."

The question again came to the attention of the Supreme Court in connection with the same improvement in the case of Tone v. Columbus, 39 O. S., 281. In that case the Ohio Court elaborated the doctrine theretofore announced by it in the Mitchell case, and determined that certain acts therein specified resulted in an estoppel against all persons asserting the unconstitutionality of the act. The court further defined what facts should be present in order to create an estoppel by silence.

This case was followed by the case of Columbus v. Sohl, 44 O. S., 479. Therein the court explained the basis of the rule on which the doctrine of estoppel in such cases is founded in the Ohio decisions. At page 482, the court say:

> "We see no reason why, in this case, an owner may not have acted by his agent as well as by himself. It was not a question of jurisdiction. The law was invalid, and no authority was derived from it for the making of the improvement beyond the extent to which it had been adopted by all concerned as a scheme for improving North High street. Its provisions simply furnished the terms of an agreement among the concurring property holders, and the basis of a commission from them to the agencies of the city for the improvement of the street; and the rights and liabilities of all parties, including the city, are to be determined by the law of contract and agency, and not by any statutory powers that may have been intended to be conferred by the legislature, for the act being invalid could confer none."

The Court further say at page 483:

> "The power to direct the improvement to be made and to make an assessment being referred to a voluntary agency, conferred by the property owners upon the city, must derive its validity from what is done in the execution of the agency, and not from any supposed jurisdiction conferred on the city by the statute in question, that could only have attached to a given state of facts, required to exist at the time the so-called ordinance was passed, and could not have been helped by any subsequent facts prior to the order for the improvement of the street and the issuing of its bonds by the city."

Applying this rule to the facts of the case at bar, we ascertain that appellants signed, with other abutting land owners, the petition by which the county commissioners were asked to improve the extension of Broad street, and by which the machinery which produced the improvement in question was set in motion. That afterward, they with others, filed with the county commissioners a request in writing that certain sewer pipes should be laid on the north and south side of the improvement; that a suitable gutter be laid next to the curb on the two outer driveways, and that the expense of said work be assessed against their property in the same manner as other assessments for the making of an improvement were to be levied and paid; that they filed with the county commissioners a petition in writing in which they requested the county commissioners to cause the bonds to be issued for the payment of the expense of said improvement to be for a period of twenty years from the date thereof; that they signed and filed with the county commissioners written communications wherein and whereby they withdrew all objection to the improvement and the assessment of their real estate therefor, on the condition that The Columbus Land Association, one of the abutting property owners, would assume the entire expense of removing the earth in the circle in the extension of said street; that they signed and filed with

the county commissioners a petition in writing, in which they asked for the cancellation of a portion of the contract with N. B. Abbott, and that in compliance with said petition, the county commissioners procured the cancellation of the contract so asked for; that afterward they filed a written communication with the county commissioners, in which they made certain recitals with respect to the loss of the original petition, and certain recitals with respect to proceedings which had theretofore been had with respect to the construction of said improvement, and the fact that doubts had arisen as to the legality of said proceedings and of the bonds that had been, or might thereafter be issued by said board of county commissioners for the purpose of raising the amount to pay for the costs and expenses of said improvement, and in which written communication they recited and declared that

> "In consideration of the said improvement, as the same has been and is now being constructed, and in order that the bonds heretofore issued and to be issued to pay for said improvement may not lie under suspicion or remain unsold by reason of the absence or loss of said original or other papers and orders, or by reason of the other matters, acts and things hereinbefore stated, we, and each of us, hereby agree that such petition hereinbefore recited was filed, signed by us as herein stated, and that we will not set up as a defense against the collection of any assessment upon our said property abutting upon said improvement for the payment of bonds issued, or to be issued on account thereof, any informality or irregularity arising from the absence or loss of any of said papers, or any of the other matters and things hereinbefore recited, but agree that said improvement has been and now is being legally made and constructed, and we hereby request that you execute and issue such further amounts of bonds as shall be necessary to pay the costs of said improvement."

That William Shepard, one of appellants, was appointed by said county commissioners and acted as one of the Board of Improvement, provided for by the act in question; that in con-

sequence of the request contained in the written communication aforesaid, and in consequence of the petition theretofore signed and filed by appellants, the board of county commissioners of Franklin county, Ohio, issued bonds in two series to the extent of $110,000.00 to pay for the cost of said improvement. The bonds so issued have been declared by the United States Circuit Court of Appeals of the Sixth Circuit to be county obligations in a suit brought by bondholders against the county and the county of Franklin, by an order of the same court has had issued against it a writ of mandamus to compel it to pay said bonds, either by the levy of a general tax, or from the general funds of the county.

> See case Board of County Commissioners vs. Gardiner Savings Institution, 119 Fed. Rep., 36, Mr. Justice Day delivering the opinion of the court.

In the case of Columbus v. Slyh, 44 O. S., 484, the Supreme Court held that a party could be estopped to complain of an assessment by actively participating in and encouraging the construction thereof subsequent to the filing of the petition therefor. In that case the Ohio Court decided that there was no

> "Essential difference between petitioning for the improvement and participating in the election of commissioners to carry the plan into execution. If commissioners had not been selected the scheme would have failed; so that those who participated in the election of commissioners promoted the improvement under the law as much as those who petitioned for it in the first instance."

In the case at bar, the appellants not only signed the petition for the improvement, but also petitioned the commissioners for each successive change or modification thereafter made in the plan and procedure, and made public declaration of their waiver of all objection to the improvement and the assessment of their property for the costs thereof.

The rule in Ohio, as interpreted in the cases above cited, is that where the law is unconstitutional the principles of contract

and agency apply, and the party will be called upon to pay his proportionate share of all indebtedness incurred in the execution of the voluntary agency conferred on the board of county commissioners by the terms of the law and the petition filed with them by the property owners. If the board does not exceed the authority thus conferred, and there is no such claim, and there is no fraud practiced, such as would release the property owner in a court of equity, and none such is claimed, he would certainly be held for the full amount of the assessment placed against his property for the improvement of the road or street, notwithstanding the fact that the law under which the improvement is made may be held to be unconstitutional.

The rule established in the Sohl case has not been disturbed by any subsequent decision of the Ohio Supreme Court in any case where the act under which an improvement has been made has been declared unconstitutional. Under the authority of this case an abutting property owner who has actively promoted the improvement and caused it to be completed, is bound to pay an assessment levied for the construction of the same, as long as fraud and bad faith on the part of the commissioners is not proven. The commissioners in such case are held to be the agents of the property owners, and as long as they keep within the authority conferred by the terms of the law, and the petition of the property owners therein, such property owners are responsible for all costs and assessments incurred in completing the improvement thus authorized to be made. If, however, the commissioners in the execution of the powers and authority conferred upon them by the property owners in such case exceed their authority, and the assessment levied is largely increased by such unauthorized acts or conduct, then it is doubtless true that upon a proper pleading and proof the property owners might be relieved in a Court of Equity to the extent of such

increase, but no such case is made by the pleadings or the evidence in the case at bar.

If the law is unconstitutional, the relation between the parties is purely one of contract. Each and all of the various sections of the act, together with the applications contained in the petition filed by the property owners, and subsequent petitions and waivers and other acts amounting to estoppel, constitute such contract, and they must be construed and interpreted together in order to determine the rights and liabilities of all the parties concerned.

The court will remember that the property owners, including appellants, in their petition invoked the action of the board of county commissioners to construct this improvement under and by virtue of the act under consideration. In the petition by way of description of the kind and character of the improvement desired they designated the nature and character of material that was afterwards adopted and used, and asked the board to widen and extend the road substantially in the manner that it was afterward widened and constructed. In other words, considering the act as unconstitutional, the appellants, by the petition they filed, specifically made this act a part of the contract between the county commissioners and themselves in compliance with the decisions of the Ohio Supreme Court theretofore rendered in such cases.

The power to assess the property of appellants is therefore limited only by the authority to construct the improvement conferred upon the county officials by the petition which the appellants signed. Such petition expressly provides the kind, character and extent of the improvement which the property owners invoked the action of the county authorities to make, and the commissioners having executed that authority, and having constructed the improvement substantially in the manner and form asked, and having levied an assessment against the property

designated within the taxing district, to an amount equal to the cost thereof, and having cast upon the county an obligation to the extent of such cost by the special solicitation of appellants and others, as shown by the waiver filed and signed for that purpose, it is now too late to enjoin the collection of this assessment, upon the evidence shown by the record in this case.

These observations are in entire accord with the doctrine announced by the Ohio Supreme Court in the case of Birdseye v. Village of Clyde, 61 O. S., 27. This case is cited by counsel for appellants, and seems to constitute one of the straws, at which, in their desperation, they are grasping. It is true that in the Birdseye case the court held that,

> "The owner is not estopped to maintain such an action (that is an action to enjoin the collection of an assessment for an improvement of a street) by having acquiesced in the construction of the improvement, nor by petitioning therefor and thereby consenting to the raising of certain proportion of its cost by assessment on all abutting property."

It will be observed in the Birdseye case that it was not claimed that the act under which the local improvement was made, and by virtue of which the assessment was levied, was unconstitutional. But on the contrary, its constitutionality was conceded. The act under which the improvement was made was a special act authorizing any village having a certain population at the last Federal census to improve its streets and construct sewers. The proceedings in question were had under such act, which was applicable to the village of Clyde, and as the court suggested, probably to that village only. The contention was, that inasmuch as the act made particular provision for such proceedings by the particular class of corporations to which it applied, its effect was to exclude any limitation imposed by the general statute (Sec. 2270 of the R. S. of Ohio) with respect to the amount of the assessment that might be levied upon abutting property, and that it contained in itself no limitation except

that the total assessment should not exceed two-thirds of the cost of the improvement. It was contended that the plaintiffs in the case were estopped from contesting the assessment against their property because, with the knowledge that the improvement was under construction, they suffered it to proceed to completion without objection. Or, that if all the plaintiffs were not so estopped, those of them were estopped who signed the petition that was presented to the council requesting the improvement to be made. The court declared that all of the plaintiffs knew of the progress of the improvement, and made no objection to its construction, or to any of the proceedings under which it was constructed, and the court says, on page 37:

> "This acquiescence on their part would be sufficient to estop them from attacking the validity of those proceedings. But they had no knowledge of the amount of the assessment charged against their lots, and could have none, until the assessing ordinance was passed; and they promptly interposed with their injunction as soon as they learned the assessment exceeded twenty-five per centum of the taxable valuation of their lots. Silence or assent to the making of the improvement could not operate as an estoppel to challenge the correctness of the assessment, for until the plaintiffs had knowledge of the assessment, it was their right to assume that it would be made in conformity with the law, and not in violation of the positive prohibitive provisions of the statute. To hold otherwise would require them not only to take notice at their peril of the illegal action of the public authorities, but to anticipate that in their official action they would disregard their legal duties. Their silence or acquiescence bound them no further than to submission to a proper assessment against their property, legally imposed."

The distinction between the Birdseye case and the case at bar is marked. In the Birdseye case there was a constitutional statute under which the improvement was being made. This statute, after having read into it the provisions of the general act, Section 2270, which the court held to be a part of the legis-

lation in question, contained a statutory limitation on the taxing power of twenty-five per cent. of the value of the abutting property as assessed for taxation. The court held that the property owners, asking for action under that law, had the right to presume that the provisions of the law would be followed, and that there could be no question of estoppel against acts of taxing officers which were contrary to the law under which the improvement was invoked. In other words, in the Birdseye case the taxing officers did not act under the law, but contrary to it. In the case at bar there is no claim that the County Commissioners did not pursue accurately and with due form every requirement of the act under which they were supposed to be operating, and by virtue of the provisions of which the appellants requested them to act.

In this case, as a matter of law, there is no "legal" assessment in the sense of the term as employed in the Birdseye case, since the act under which this improvement was constructed has been repeatedly held to be in conflict with the constitution of Ohio, as being special legislation on a subject of general nature. It falls, therefore, not under the doctrine of the Birdseye case, but under that of the Mitchell, Tone and Sohl cases, which have special application to the facts stated in this case.

The general statute (Section 2270) discussed in the Birdseye case does not apply to counties, and therefore would not in any event apply to this case. The power to assess the property of appellants is limited only by the power conferred on the county authorities to construct the improvement. As hereinbefore stated, the petition expressly provides for the kind, character and extent of the improvement which the property owners invoked the action of the county authorities to make, and the commissioners having executed that authority, and having constructed the improvement substantially in the manner and form asked and having levied an assessment against the prop-

erty designated within the taxing district pro rata and equitably upon all property owners therein to an amount equal to the cost of said improvement without protest or objection on the part of appellants, and entirely upon the strength of the acts, conduct and written petition and waivers of said parties, appellants are now too late to invoke the extraordinary remedy of injunction to restrain the collection of any part of this assessment.

We contend that a different rule applies in cases where the act of the legislature is declared to be constitutional from those wherein an unconstitutional act is under consideration. In the former case the public authorities are permitted and are presumed to construct an improvement in accordance with the provisions of such law, and of the other general statutes applicable to such case. The property owner may, when required to act, insist upon all the protection afforded him by any and all of the general statutes when by his act and conduct he merely sets in motion the public machinery which results in the construction of the public improvement, and he cannot be deemed to waive any of his statutory or constitutional rights. After the filing of his petition in such case the statutes governing the rights of all parties concerned control the conduct of public officials in all matters connected therewith.

Where the law is unconstitutional, however, and the extent of the authority conferred on the public authorities is circumscribed and controlled by the principles which operate in the interpretation of contracts, property owners can have no relief from the legitimate result of their acts and conduct unless the public officials exceed their authority in the premises.

Under the act in question here, until the property owners took the initiative and the owners of property representing a majority of the feet front along the improvement, filed a petition under the unconstitutional law, the public authorities had

no power to act, and were without any jurisdiction under said law. The property owners having taken advantage of said act, and having empowered the commissioners to proceed under its provisions, cannot be heard to object to the enforcement of each of the provisions contained in the law, which they set in operation.

Storer v. Cincinnati, 4 C. C., 279, cited by counsel for appellants in their brief, which was affirmed by the Supreme Court of Ohio, 24 W. L. B., 371, scarcely serves as an authority for their purpose. In that case the Circuit Court and the Supreme Court held that a property owner could waive the statutory limitation of twenty-five per cent., which the legislature had enacted for his protection, if he did so with full knowledge that such limit would be exceeded. It is our contention that the rule thus declared is applicable with equal force to the waiver of constitutional provisions intended for the same protective purpose.

The doctrine that private individuals may waive constitutional provisions enacted for their benefit is equally well established in the Federal Courts.

In the case of Daniels v. Tearney, 102 U. S., 415, the court held:

> "Where a party has availed himself of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense."

In that case the defendants executed a joint and several bond whereby they bound themselves to pay to the plaintiffs a certain sum when thereunto requested. There was a condition attached to the bond which recited the issuance of a writ of fieri facias for a certain sum therein named, and provided that if the judgment debtor should pay the debt when a certain ordinance of the state of Virginia should cease, then the obligation should be void, otherwise to be in full force. The defendant pleaded as a

defense to the bond the fact that it was executed in pursuance of the requirements and conditions of a statute passed in violation of the Constitution of the United States, and that said statute was subsidiary to and in aid and in furtherance of the objects and policy of the Ordinance of Secession theretofore passed by the convention of the state of Virginia.

The court, after holding that the statute under which the bond was given was in contravention of the Constitution of the United States, and that the bond as a statutory bond, was clearly void, used the following language on page 422, Mr. Justice Swayne, delivering the opinion:

> "Conceding the bond to have been wholly void in both aspects, it does not by any means follow that it could not thereafter, under any circumstances, be enforced as between the parties, or that there is such error in the judgment that it must necessarily be reversed." * * *
>
> "The principle of estoppel thus applied, has its foundation in a wise and salutary policy; it is a means of repose. It promotes fair dealing. It cannot be made an instrument of wrong, or oppression, and it often gives triumph to right and justice where nothing else known to our jurisprudence can, by its operation, secure those ends. Like the Statute of Limitations, it is a conservator, and without it soceity could not well go on. * * * *
>
> "It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect." Citing numerous cases.

In the case of *Pierce v. Somerset Railway*, 171 U. S., 641, the Court held:

> "A person may, by his acts or omissions to act, waive a right which he might otherwise have under the Constitution of the United States."

In the case of Wight v. Davidson, 181 U. S., 371, this court held:

> "A constitutional right against unjust taxation is given for the protection of private property, and it may be waived by those affected who consent to such action to their property as would otherwise be invalid."

On page 377, Mr. Justice Shiras, in delivering the opinion of the Court, said:

> "It may well be doubted whether the appellees are in a position to question the validity of the statute. They are the owners of the 'Kall' tract mentioned in the first section of the act, and with respect to which it was made a condition that the owners should dedicate the land in said tract contained within the lines of the street to be extended; and, it appears by the record, that, in order to procure the desired action of the commissioners, they did dedicate to the District of Columbia for highway purposes the land in said tract contained within the lines of S. Twenty-second and Decatur streets."
>
> "Prior to the filing of the petition of the commissioners, the authorities of the District of Columbua had taken no steps toward the contemplated extension of these streets. In fact, under the act they had no power to do so. The power was called into action by the dedication of the Kall tract. By such dedication the appellees put the act into operation, and voluntarily subjected themselves to its provisions, including the mode of assessment. *The constitutional right against unjust taxation is given for the protection of private property, and may be waived by those affected who consent to such action to their property as would otherwise be invalid.*
>
> "And under some circumstances a party who is illegally assessed may be held to have waived all right to the remedy by a course of conduct which renders it unjust and inequitable to others that he should be allowed to complain of the illegality. Such a case would exist if one should ask for and encourage the levy of the tax of which he subsequently complains; and some of the cases go far in the direction of holding that a mere failure to give notice of objections to the one who, with the knowledge of the person taxed, as contractor or otherwise, is spending money in reliance upon payment from the taxes, may have

the same effect." Cooley on Taxation, 573; Tagh v. Adams, 10 Cush., 252; Bidwell v. City of Pittsburg, 85 Penn., 412; Lafayette v. Fowler, 34 Ind., 140; Shutte v. Thompson, 15 Wall., 151, 159.

We respectfully suggest to the court the similarity between the language and the conclusion expressed in the opinion of Mr. Justice Shiras in Wight v. Davidson, and the opinion of the Supreme Court of Ohio in the cases of Mitchell, Tone and Sohl, on the doctrine of estoppel by waiver of constitutional provisions in such cases.

Against the authority of these cases adverse counsel have urged the decision in O'Brien v. Wheelock, 95 Fed. Rep., 1883, upon which they mainly, if not exclusively, rely in this connection. Since the argument and decision of the case at bar in the court below, the case of O'Brien v. Wheelock has been decided by this court and the decision is reported in the 184 U. S., 450. It is true that in this case the court did hold that

> "Landowners are not estopped to deny the constitutionality of a statute authorizing assessments for a local improvement, *as against one who purchased, in the open market and on the advice of counsel, bonds which such assessments, if valid, would be used to pay,* merely because they, or some of them had secured the passage of the act providing for the improvement, had participated in the organization of the assessment district, and in various ways proceeded under the assumption that the act was valid."

In the O'Brien case the action was brought by the executors of one Palms for the enforcement of levee assessments against the lands of defendants in order to secure money to redeem certain bonds purchased by Palms, and the proceeds of the sale of which bonds it was averred were used in the construction of levees abutting upon the lands of defendants, under certain unconstitutional acts. Various defenses were urged against the action. It was urged among other things on behalf of the petitioners in the original action that even if the bonds were

void because issued under unconstitutional acts, the land owners were estopped from asserting such invalidity because of their own conduct with reference to the legislation under which the invalid bonds were issued.

In commenting upon this phase of the case, Mr. Chief Justice Fuller, in delivering the opinion of the court, on page 489, said:

> "But it is contended that while all this may be so as to the general public, yet that appellees, or some of them, have so conducted themselves that they are estopped from asserting such invalidity, and that the Circuit Court should have enforced the assessments exactly as if the law had been a constitutional enactment. The bill sought to collect not only the assessments already made, but asked to have further assessments made to pay the bonds in full, and to maintain and preserve the security; and the court was also asked to declare that the assessments created valid liens upon the lands, and to decree that the bonds sued on were a lien on the assessments and to enforce their collection. In other words, that the court execute the act, either as in itself wholly valid or valid as to these defendants. We are unable to assent to the doctrine of legislation by estoppel. The courts cannot by the execution of an unconstitutional law *as a law*, supply the want of power in the legislative department."

The distinction between the O'Brien case and the case at bar is marked. In the O'Brien case the bonds were signed and issued by the Commissioners, were by them delivered to the contractors, and by the contractors sold. The Commissioners assumed no liability with respect to them. The land owners had no control of the question whether bonds should be issued, and were not in any privity of contract with the purchasers of the bonds.

In the case at bar the County Commissioners, under the authority of the Ohio cases, were acting as the agents of the land owners. The bonds were issued at the request of such land owners, and before the last $60,000.00 of such bonds issued were authorized by the Commissioners the land owners

expressly declared in a written communication and request addressed to said Commissioners that they would consent to the assessment upon their lands for the purpose of providing for the payment of such bonds.

In the O'Brien case the action was an action between bond purchasers and land owners, between whom, as this court expressly declared, there was no privity of contract. This court further held that Palms did not rely, and had no right to rely on the acts, or assurances, or silence of any of the different classes of land owners, and that there was no evidence to show that he did so rely, or that he was thereby misled. The evidence further showed that Palms purchased the bonds in that case, not of the land owners, nor any of them, nor from the levee commissioners, but on the open market and on the advice of counsel as to the legality of the proceedings, and that he and the land owners acted equally in the mistaken belief that the law was valid.

In the case at bar the County Commissioners acted and could act in the construction of the improvement in question only upon the petition of the land owners. All expense which they incurred was incurred with the knowledge, and at the request of appellants. The bonds were issued upon the express promise of the abutting property owners that assessments should be made on such property to redeem said bonds when they matured, and that the legality of such assessments would not be questioned by them. The obligations which were issued have been held to be county obligations, and the county was induced by the declarations of the appellants and others to change its position to its disadvantage, and to assume obligations it would not have assumed except for their solemn acts and declarations.

In O'Brien v. Wheelock, this court further found, as did also the Supreme Court of Illinois, that the act under which it was attempted to construct the levee for the cost of which the

bonds in question were issued, was not broad enough to include in its terms work of so exclusive a character. In other words, it was expressly held that the authority conferred by the act, even if it had been held to be a valid and constitutional act, was not sufficient to authorize the work claimed to have been done under its provisions.

In the case at bar there is no claim that the County Commissioners did not follow with the utmost nicety the exact method and procedure provided for in the act of 1890. It was further found in the O'Brien case, see page 491, in the opinion of this court, that the land owners did not and could not receive the benefits which it was contemplated would accrue to them from the proceedings if they had been valid. No such fact is present in this case. The improvement was made and completed in the exact manner and to the same extent that it would have been made and completed had the act been valid.

The Circuit Court of Appeals in commenting upon the claim of estoppel as urged before it, also made certain statements of fact which were doubtless controlling in the conclusions of that court and of this court, as follows:

> "No assurances of any affirmative character were given by the land owners to those who constructed the work, or to those who like Palms, purchased the bonds after they were executed and delivered to the contractors."

The statement is repeatedly made in the observations of Mr. Justice Harlan, on pages 906 and 907, of the 95 Fed. Rep., that the land owners gave no personal assurances and made no representations.

Considering these expressions of the court in connection with the declarations and statements and waivers made by the appellants in the case at bar, it requires little reflection to show the absolute difference in the fundamental facts creating the claim of estoppel in this case as compared with the case of O'Brien v. Wheelock.

We have considered this case more fully than we believe to be necessary, for the reason that counsel for the appellants have seen fit to declare in substance that they are content to stand or fall with the decision of O'Brien v. Wheelock. If the two cases were at all similar the decision in that case would doubtless be controlling, but as they are not, we are confident that counsel are resting their hopes upon a false basis.

It is apparent from the most cursory inspection of the record and the evidence in this case that the manifest purpose on the part of appellants in signing the petition and other documents which were signed and filed with the County Commissioners was to cause said County Commissioners to act in the premises, and to cause the improvement of East Broad street to be made, in the manner and to the extent that it was subsequently made.

The appellants, with their associates, invoked the action of the County Commissioners to enhance the value of their lands, and actively promoted the improvement, knowing that its cost must be paid for by a foot front assessment upon their property, and that of their neighbors. They recognized the advantage of the plan afforded by the act passed by the legislature March 26, 1890, and with the other petitioners presented their application to the Board of Commissioners to induce them to proceed under that act. They recognized the justice of the assessment from time to time during the progress of the work, and afterward by paying seven annual installments of the assessment. They were induced to seek the improvement largely by the fact that a large tract of land owned by them stood close to the thoroughfare to be improved, and adjacent to the capital city of Ohio, and by the expected advantage that would be reaped by all of said land in the light of the improvements that were being made, and were about to be made in that vicinity. As a result of their action, and that of their co-petitioners, bonds to the amount of $110,000 were issued by the

Commissioners to pay the costs and expenses of said improvement. After this immense burden has been settled upon the county, it is too late for the appellants to complain of the method of the assessment, or of the unconstitutionality of the law under which the petition was filed and the bonds were issued.

The Doctrine of estoppel has become a rule of property in Ohio.

The rule of estoppel or waiver of constitutional provisions now so long established under the decisions of the Supreme Court of Ohio, by which property owners are refused relief from assessments levied under unconstitutional laws, when such persons actively participated in promoting the improvement, or caused it to be constructed, has become a rule of property.

Section 10, of the act under consideration, reads as follows:

> "Such assessment, with the interest accrued thereon, shall be a lien on the property abutting on the streets or roads improved, from the time the contract is entered into for the making of said improvement, and shall remain a lien until fully paid, having precedence of all other liens except taxes, and shall not be divested by any judicial sale unless the payment of the same is provided for from the proceeds of such sale; such lien shall be limited to the depth of 250 feet on the lands abutting on said improvement; no mistakes in the description of the property, or the names of the owner or owners shall impair such lien."

Section 11 reads as follows:

> "Any owner of property against whom an assessment shall have been made for such improvement, shall have the right to pay the same, or any part yet remaining unpaid, in full, with the interest thereon, to the next semi-annual payment due on said premises; such payment shall discharge the lien on the property. If any owner shall sub-divide any abutting property after such lien attaches, he may discharge the same upon any part thereof in like manner."

Under the sections above quoted, the County Commissioners were authorized by the abutting property owners not only to construct this improvement, but also to determine the cost thereof in the manner provided in Section 8 of the act; under the provisions of these sections, and the decisions of the Supreme Court of Ohio already cited, it is plain that the assessment complained of in this case is a lien against the property of appellants. The title to their property is so involved that unless this lien is removed by decree of court it will take precedence over other liens subsequently acquired or placed against said property. The decisions of the Supreme Court of Ohio consistently adhered to as shown herein, upholding assessments under unconstitutional laws, under the doctrine of estoppel, by the application of the principles of contract and agency, have become a settled rule of property in this state, which should be, and under the authorities of this court, will be respected in like cases in the United States courts. The existence of two coordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal Courts, no less than by the State Courts themselves as authoritative declarations of what the law is on those subjects.

In the case of Lippincott, et al., v. Mitchell, 94 U. S., 767, this court held:

> "A rule of property of a state binds this court as much as if it were a part of the statute."

In delivering the opinion of the court, Mr. Justice Swayne, after citing certain decisions of the Supreme Court of Alabama, holding that a wife in that state could not mortgage her equitable or statutory separate estate for the husband's benefit, uses the following language:

> "This construction is a rule of property of the state, and we are as much bound by it as if it were a part of the statute. It is our duty to apply the law of the state as if we were sitting there as a local court, and this case were before us as such a tribunal."

Citing:

> Leffingwell v. Warren, 2 Black, 599;
> Olcott v. Bynum, 17 Wall., 44.

In the case of Orvis v. Powell, 98 U. S., 176, the court held:

> "The order in which real estate which has been mortgaged and subsequently sold, at different times to different purchasers, shall be subjected to satisfaction of the mortgage, is, where the rule is established by state statute or the decisions of state courts, a rule of property which will be followed by the Federal Courts sitting in such state."

In delivering the opinion of the Court, Mr. Justice Miller said:

> "As regards the question raised by the first of these assignments, we are relieved from any discussion of what is the true, equitable rule on the subject, because we consider that when such rule is adopted it is, within the decisions of this court, a rule of property affecting the title to real estate, and as such is to be governed, in its application in this court, by the law of the state where the land lies. In a case where no statute of the state makes provision on the subject, and no decisions of the state court have established a rule, it would be our duty to inquire what is the doctrine of the equity courts on the subject."
>
> "The Supreme Court of the State of Illinois having announced on very full consideration the rule which was followed by the Circuit Court, there was no error in that court in following it."

In the case of Burgess v. Seligman, 107 U. S., 20, this Court held:

> "The courts of the United States, in the administration of state laws in cases between citizens of different states, have an independent jurisdiction co-ordinate with that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws."
>
> "Where, however, by the course of the decisions of the state courts, certain rules are established which become rules of property and action in the state, and have all the effect of law—especially with regard to the laws of real estate, and the construction of state constitutions and statutes, the courts of the United States regard such rules as authoritative declarations of what the law is. But where the law has not been thus settled, it is their right and duty to exercise their own judgment; as they also always do with reference to the administration of commercial laws; but when contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions of the state tribunals, or when there has been no decisions, the courts of the United States hold the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued."
>
> "But, even in such cases, for the sake of harmony, and to avoid confusion, the courts of the United States will lean toward an agreement of views with the state courts if the question seems to them balanced with doubt."

See, also,

Etheridge v. Sperry, 139 U. S., 266.

Fundamentally the doctrine of estoppel does not involve a Federal question. On this feature of the case, therefore, the Federal Court will follow the decisions of the state court. If by the decisions of the state court, or by a settled law of the

state, the party complaining is estopped, he can obtain no relief in the Federal Court.

Electric Company v. Dow, 166 U. S., 409;
Baupre v. Noyes, 138 U. S., 397;
Israel v. Arthur, 152 U. S., 355;
Marrow v. Brinkley, 129 U. S., 178;
Adams & Co. v. Burlington & U. R. R. Co., 112 U. S., 123.
Schaefer v. Werling, 188 U. S., 516.
Gillis v. Stinchfield, 159 U. S., 658.
Beals v. Cone, 188 U. S., 184.

Special facts of estoppel as to Thomas McLeish and Joseph Busch.

Thomas McLeish and Joseph Busch were not originally complainants in the action below, but before trial were substituted as such for Leonard Carr, it being made to appear that they had taken the title to his interest in the land in question. In the deed by which they obtained title to this undivided one-third interest, the same having been acquired by purchase, there appears the following stipulation: (See page 93 of the printed record).

> "It is further stipulated and agreed that on the first day of July, 1899, a warranty deed was executed by Leonard Carr, one of the complainants herein, as grantor, to James McLeish (this should be Thomas McLeish) and Joseph Bush, conveying the premises conveyed in the complaint herein, in which deed the following stipulation appears: 'Except a mortgage for $6000, given by William Shepard, Charles McLeish and wife, Leonard Carr and wife, to F. F. Hoffman, as recorded in Mortgage Record, 156, page 560, Franklin county, Ohio, records, and except all taxes and assessments of what kind and nature that may be a lien on the one-third part of the Marion township property hereby conveyed, and all taxes, liens and assessments that may be due and unpaid on the other property hereby conveyed, being hereby assumed by the grantees herein as part of the purchase price for said premises."

In his testimony on page 98 of the printed record, Leonard Carr testified as follows:

Q. Mr. Carr, you recently sold your interest in the Alum Creek Ice Company in certain real estate belonging to that Company, didn't you? A. Yes, sir.

Q. At the time you made this sale I will ask you to state whether or not the assessment of East Broad street was considered as a part of the consideration? A. Yes, sir.

Q. I wish you would explain that to us. A. Well, when I come to figure up—to make the sale, I asked for the indebtedness, and they give it to me, and among the rest was this assessment on Broad street property; I think they told me there was $4500.00 still back assessment on the property, and they charged me up with $1500, one-third of the assessment and tax for the improvement on Broad street.

Q. And you permitted them to figure $1500.00 as a part of the indebtedness of the Ice Company for this assessment—your share of this assessment? A. Yes, sir.

Q. It was settled on that basis, was it? A. Yes, sir.

Q. In other words, you paid $1500.00 of this assessment to your grantees? A. Yes, sir.

It appears from the foregoing stipulation as to the covenants in the deed, and from Mr. Carr's testimony, that appellants have been paid, by way of an actual reduction in the purchase price for Carr's interest in the premises, one-third of the balance remaining due on this assessment. They certainly have no right in equity for the purpose of effecting a settlement with Mr. Carr to consider the balance of this assessment as a legal and binding obligation, and receive from him cash upon that basis in the adjustment of their mutual affairs, and afterward contend that the assessment is illegal, and thus avoid the payment of the part thereof theretofore assessed to Carr, and

thereby make a profit to themselves of $1500.00, to the disadvantage of the county.

We insist that the rule announced by the Supreme Court of Ohio in the case of Caldwell v. City of Columbus, 37 W. L. B., 270, is now, and always has been the rule in Ohio in such cases. The syllabus in that case reads as follows:

> "Where a purchaser of a lot which is subject to an assessment, in the deed assumed the payment of the same without any reservation, he cannot afterwards contest the legality of such assessment in whole or in part, and it will be assumed that such assessment was taken into consideration in determining the purchase price for the lot, nothing in the deed appearing to the contrary. Testimony to explain and show the true intention of the parties where the language of the deed is not ambiguous, is not competent."

The statement of facts certified by the Circuit Court to the Supreme Court in the Caldwell case, on which the judgment of the Circuit Court was affirmed, is interesting and pertinent because the finding of facts with reference to the assumption in the deed between the parties is identical with the assessment in the deed from Carr to McLeish and Bush in the case at bar.

In the case of Thompson, Admnrx. vs. Thompson, et al., 4 O. S., 333, the first syllabus of the opinion reads as follows:

> "It seems to be a well-settled principle, that the purchaser of an incumbered estate, if he agree to take it subject to the incumbrance, and an abatement is made in the price on that account, is bound to indemnify his grantor against the incumbrance, whether he expressly promise to do so or not—a promise to that effect being implied from the nature of the transaction."

The last syllabus reads as follows:

> "If one person, upon a sufficient consideration, make a promise to another, for the benefit of a third person, such third person may maintain an action at law upon the promise."

On page 349, Thurman, C. J., in delivering the opinion of the court, repeats the language of the syllabus, and cites cases supporting the proposition.

In the case of Cramer v. Lepper, 26 O. S., 59, the court held:

> "Where one purchases land subject to a mortgage lien, and as part of the consideration, agrees to pay the mortgage debt, he cannot defend against the mortgage on the ground of usury."

The first paragraph of the opinion reads as follows:

> "As between Taylor, the mortgagee, and Lepper, the grantee of the mortgagor, the latter must be regarded as the purchaser of the equity of redemption merely, and as such, he had no right to set up by way of defense that the note secured by the mortgage was usurious. The defense of usury in such case is personal to the mortgagor, and if waived by him, cannot be set up by his grantee, who assumes, in consideration of the grant, to pay the claim of the mortgagee."

In Freeman v. Auld, 44 N. Y., 50, the court held:

> "One who holds real estate under a deed, which by its terms is subject to a prior mortgage, is estopped from questioning the consideration or validity of that mortgage."

In Devlin on Deeds, Section 1064, the writer says:

> "Although the grantee has not assumed the payment of the mortgage, yet when the deed has been made subject to the mortgage, and the amount has been deducted from the consideration, the grantee cannot contest the validity of the mortgage."

So in the case at bar, it is our contention that the defense of illegality, assuming but not admitting that the assessment was illegal, was personal to the grantor, and if he concluded to recognize the assessment in full and paid it by way of reducing the purchase price for the premises, then his grantees cannot complain of the illegality of the assessment, because they are not injured by its payment. They have no right nor interest in the money deducted by them from the purchase price. They

are in a sense trustees to the extent of such deduction, and are bound in equity to pay the assessments as they become due.

The case of Crawford v. Edwards, 36 Mich., 355, was before the Supreme Court of Ohio in the consideration of the Caldwell case, and by the affirmance of the judgment in that case, they impliedly, at least, adopted the doctrines of the Michigan decision, as follows:

> "The acceptance of the grantee of a deed conveying land subject to a specified mortgage, and providing that he shall assume and pay said mortgage bond, may be as effectual as though the deed were between the parties, and executed by both grantor and grantee; and such proviso in a deed is to be treated, after acceptance by the grantee, as an express agreement to assume and pay the mortgage specified. The obligation of the purchaser, who, in any manner by such an agreement in the deed he accepts, assumes and agreed to pay a specified mortgage, inures in equity to the benefit of the mortgagee, who may enforce it against the purchaser in a bill to foreclose the mortgage. Nor is he at liberty to show any defense that the mortgage he has assumed and agreed to pay was without consideration and therefore not a valid claim against his grantor; the latter having seen fit to waive any defense he may have had to the mortgage; and having appropriated a portion of the purchase price coming to him for the payment thereof, his grantee is precluded from assailing its validity."

The case of Lewis, Auditor, v. Taylor, 18 C. C., 443, cited by counsel, is not in point. In the first place, the assessment there challenged was placed upon the tax duplicate after the lease agreeing to pay taxes and assessments had been executed, and it could not have been in the minds of the parties at the time the contract of lease was made. Secondly, the agreement in that case was a lease providing for rental, and not a deed containing a stipulation as to purchase price. There was not, and could not have been in the Lewis case, any deduction from the purchase price on account of the assessment, and the principle of the Caldwell case, and not the principle of the Lewis case is applicable to the case at bar.

The principle for which we here contend is not affected by the decision in the case of Walsh, et al., vs. Sims, Treasurer, 65 O. S., 211, decided since the decision of this case in the court below. While it is true that the Supreme Court of Ohio found that the recital in the deed in the Walsh case was not sufficient to operate as an estoppel against the purchaser to contest the legality of the assessments, their decision was planted flatly upon the insufficiency of the recitals to constitute an assumption of payment and not because of any disposition on the part of the court to depart from the doctrine theretofore announced by it in the Caldwell case.

On page 216, in delivering the opinion of the court, Spear, J., says:

> "The proposition in support of the holding (of the Circuit Court) is that here is an agreement by the purchaser to pay the assessment because he has not paid the vendor the full value of the land, but has reserved in his hands so much purchase money for the purpose of discharging the lien. When this is made to appear the rule of law which follows is well understood. It has been applied time and again by this court."

On page 218, the court further says:

> "The case of Caldwell v. Columbus, 56 O. S., 759, is cited by counsel for defendants in error as sustaining their contention. In that case the assessment had been made and partly paid at the time of the sale, and in the deed, accepted by the purchaser, was this clause: 'And all liens, taxes and assessments whatsoever created by or existing in consequence of any improvements of the streets and avenues touching said lots, or either of them, whether under what is known as the Taylor law or otherwise, that are now due or that may hereafter become due, said grantee assumes and agrees to pay as a part of the purchase price of said lots.' It was held that the purchaser could not contest the assessment."

Counsel for appellants, in arguing in the Supreme Court of Ohio a case involving the validity of assessments made for the

payment of the cost of this same improvement, sought to bring to the support of his case the great weight and authority of the name of Mr. Chief Justice Marshall, by quoting with apparent satisfaction a decision wherein that distinguished jurist declared that he had always made it a rule in deciding a case to first ascertain what was morally right between the parties, and then so to apply the law that there would be no conflict between the moral right and the law.

We have not as yet been favored with a copy of the brief which counsel expect to file in this court for use in this case, but it is not improbable that the same citation will be urged here.

We apprehend that this court will have no difficulty in adjusting its sense of justice, and its respect for authority, so that there need be no conflict between them in the decision in this case. To quote the language of another Federal judge, Judge Thompson, in deciding this question in the court below:

> "The complainants invoked the action of the county commissioners to enhance the value of their lands. They actively promoted the improvement, knowing that its costs would be paid for by the foot front assessment on their property. They recognized the justice of the assessment from time to time during the progress of the work, and afterward by paying annual installments of the assessment for seven years, until they were tempted by the decision of the Supreme Court in Baker v. Norwood, to cast their burden upon the general public, and it is now too late to complain of the method of the assessment, or of the lack of special benefits which were dissipated by the collapse of the boom."

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 217.

WILLIAM SHEPHARD ET AL., APPELLANTS,

v.

O. E. D. BARRON, TREASURER, APPELLEE.

CASES CITED BY COUNSEL FOR APPELLEE ON ORAL ARGUMENT NOT NAMED ON THE BRIEF.

ON THE OHIO RULE OF ESTOPPEL.

Corry *v.* Gaynor, 22 O. S., 584.
Treas. *v.* Martin, 50 O. S., 197.
Mott *v.* Hubbard, 59 O. S., 199.

ON OHIO RULE OF STATUTORY CONSTRUCTION AND CHANGE OF DECISIONS AS TO CONSTITUTIONALITY.

State *ex rel.* Hibbs *v.* Comm'rs of Franklin Co., 35 O. S., 458.
Hixson *v.* Burson, 54 O. S., 470.
State *ex rel. v.* Davis, 55 O. S., 15.
Mott *v.* Hubbard, 59 O. S., 199.
Benignus *v.* Barron, 62 O. S., 666.
Morrison *v.* Barron, 68 O. S., 658.

STATUTES CONFERRING OBLIGATIONS AND POWERS ON COUNTY COMMISSIONERS TO REPAIR IMPROVED ROADS.

Section 845, Revised Statutes of Ohio.
Chapter 10, title VII, section 4878 *et seq.*
Sections 4829, 4836*f*.

AS TO ADMISSIBILITY OF WAIVER, ON PAGE 94.

Section 850, Revised Statutes of Ohio.

Respectfully submitted.

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